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IN THE

Supreme Court of the United States

October Term, 1964

No. 752

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC., INGE AND COMPANY, INC., BARR SHIPPING COMPANY, INC., MAJOR FORWARDING COMPANY, INC. AND JOHN H. FAUNCE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals for the Second Circuit, entered on October 14, 1964, affirming an order of the Federal Maritime Commission (herein "Commission") dated April 2, 1963, promulgating General Order 4, Amdt. 1, Subpart B (28 F. R. 4300).

Opinions Below

The opinion of the Court of Appeals, reported at — Fed. — is annexed hereto as Appendix A, p. 19, *infra*. The opinion of the Commission in its denial of petitions for reconsideration is annexed hereto as Appendix B, p. 46, *infra*.

Jurisdiction

The judgment sought to be reviewed was entered on October 14, 1964 (App. A, p. 44). The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. May the Commission by rule forbid a forwarder practice not unlawful under any statute.

2. Was the court below correct in holding that the term "beneficial interest" in the definition of "independent ocean freight forwarder" in Section 1 of the Shipping Act meant "any interest"?

3. May compensation which has been lawfully earned be denied by rule because a forwarder performs an act which the regulatory statute does not prohibit?

4. Was the court below correct in holding that the charging of service fees in varying amounts to shippers by a forwarder violates Section 16 (First) of the Shipping Act, even though there was no evidence, as long standing precedent requires, that the shippers were competitors or that the preference to one shipper or disadvantage to the other was the proximate cause of an injury?

5. May the Commission require a forwarder to disclose a special contractual arrangement with his customer to a competitor of the customer on demand, when such disclosure is not required by the Shipping Act and would reveal confidential information in a violation of Section 20 of the Act?

Statutes and Regulations Drawn in Question

This appeal involves the authority of the Commission to issue certain regulations under the Shipping Act (46 U. S. C. § 801 *et seq.*) and an amendment thereto, Public

Law 87-254, 75 Stat. 522, enacted September 19, 1961. The pertinent provisions of the Act, P. L. 87-254 and the regulations are set forth in Appendices C and D, p. 54 and p. 59.

Statement of the Case

Upon the promulgation by the Commission of General Order 4, Amdt. 1, Subpart B (hereinafter "Subpart B"), an appeal was taken by petitioners to the Court of Appeals for the Second Circuit under 5 U. S. C. § 1031 *et seq.* and 5 U. S. C. § 1001 *et seq.* The specific rules challenged upon appeal were §§ 510.21(1), 510.22(a), 510.23(j), 510.24(e), 510.24(g) and 510.25(a) of Subpart B. At the request of the Commission § 510.24(g) was remanded for further consideration and after the rule was materially changed, petitioners withdrew their objection. After the judgment of affirmance herein, a motion for a stay of the mandate of the Court of Appeals for thirty (30) days was granted pursuant to the provisions of 28 U. S. C. § 2101(f) to permit the filing of the within petition.

The New York Foreign Freight Forwarders and Brokers Association, Inc., one of the petitioners herein, is composed of approximately 110 ocean freight forwarders. The individual petitioners are members of the New York association. The members of the association conduct their business primarily through the Port of New York but also do a substantial business in the other major ports in the United States, either through branch offices or corresponding forwarders.

An ocean freight forwarder is the agent at the port of either an exporter or overseas consignee to render necessary services to accomplish the exportation of merchandise via a common carrier by water. In that capacity the forwarder performs a variety of detailed and technical services.

Prior to the time that merchandise actually moves from an exporter's plant, the forwarder advises as to the proper

port of exit, governmental licensing requirements and letter of credit intricacies. The forwarder follows the movement of the cargo from the inland supply point to port area, seeing to it that the cargo reaches seaboard in time to meet the designated steamer. He makes the necessary arrangements to reserve space aboard a particular vessel, known as "booking the cargo", and the forwarder also prepares required shipping documents, consisting, inter alia, of the dock receipt, delivery order, bill of lading, export declaration and the consular invoice when required.

In most instances the forwarder performs so-called accessorial services, such as arranging insurance, cartage, and warehousing. The marine insurance is placed either under the exporter's open marine policy or the forwarder's. The latter policy is one which the forwarder has negotiated with an underwriter naming himself the assured. When requested to arrange coverage under his policy, the forwarder classifiies the goods, negotiates a rate with the underwriter, issues a certificate of insurance which he endorses over to the shipper and handles any claim that may arise.

To reimburse himself for the cost of arranging insurance under his own policy or other accessorial services the forwarder charges the shipper a fee over and above his actual disbursement. It has been the traditional practice in New York for a forwarder to show on his invoice to the shipper as one item the total charge for rendering each accessorial service, such as "Insurance Placing Service". Because of the volume of business that he gives to a marine underwriter, in many instances the forwarder's overall charge to the shipper, including the forwarder's markup, is less than what the shipper may be able to obtain in the open market.[1]

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[1] The Commission so found in its exhaustive overall investigation of the ocean freight forwarding industry. *Investigation of Practices, Etc. of Ocean Freight Forwarders*, 6 F. M. B. 327, 341.

The Commission has found that "the forwarding industry is an integral part of the commerce of the United States."[2] In 1961 the Senate Commerce Committee described the forwarding industry as "a highly important segment of the economy of the United States." (S. Rept. 691, 87th Cong., 1st Sess., p. 3.) The Court of Appeals noted herein that "* * * without the industry's services, our vital export trade would be at a serious disadvantage in the intense competition of world commerce." (App. A, p. 35).

REASONS FOR GRANTING THE WRIT

I

The Decision Below is in Direct Conflict with Applicable Decisions of this Court Dealing with the Extent of the Rulemaking Authority of a Federal Regulatory Agency.

Petitioners contended below that the Commission's rulemaking authority is limited to correcting practices found to violate the regulatory provisions of the 1916 Shipping Act. If a practice sought to be regulated was not contrary to a substantive provision of the 1916 Act, we urged that the regulation was invalid.

Our position was based upon the decisions of this Court. In *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284, the Court reviewed a rule of the agency making unlawful as a lottery "giveaway" programs of broadcasting stations. The statutory rulemaking authority of the F. C. C. was virtually identical in language to that of the Maritime Commission. On appeal the issue was whether the rule constituted a proper exercise of the F. C. C.'s rulemaking

[2] Op. cit., p. 334.

power. The Court, speaking through Chief Justice Warren, held the rule unlawful, stating:

> "But the Commission's power in this respect is limited by the scope of the statute. Unless the 'give-away' programs here are illegal under § 1304, the Commission cannot employ the statute to make them so by agency action." (p. 290)

This same doctrine was applied to the Maritime Commission's rulemaking authority in *California* v. *U. S.*, 320 U. S. 577. In that case the court noted that if the agency "found disobedience of the law" (p. 583) it could then by rule define the outer boundaries of proper conduct. The Commission has itself recognized the limitations upon its rulemaking authority, citing *California* v. *U. S.*, when it said in its overall investigation of the forwarding industry that: " * * * *upon findings of unlawfulness,* we are authorized to issue rules under the Act prescribing corrective action for the future" (6 F. M. B. 327, 358, emphasis supplied).

Notwithstanding the foregoing authorities, the Court of Appeals rejected our contention, refusing to agree with what it described as "this restrictive view of the agency's powers" (App. A, p. 28). In so doing, the court failed to distinguish or even deal with the cases cited. Instead, it held that the challenged regulations need only be "reasonable and consistent with the authority granted in the 1916 Shipping Act and the 1961 Freight Forwarder Law" (App. A, p. 31). Precisely what the Court of Appeals meant by "consistent with the authority" of the two laws is obscure. If it meant that the rule must be corrective, that is, based upon a finding of a violation of law, the court would be in agreement with our position as to the extent of the agency's rulemaking power. It would seem, however, that this is not what the court meant, since it was of the view that petitioners' position was "restrictive". Thus, what the court below has in effect held is that the agency

may regulate *any practice*, regardless of whether it violates a substantive provision of the regulatory statute. The Commission could establish its own standards of proper conduct by the forwarder with the only restriction being that the rule be "reasonable". The further restriction that the rule be "consistent with the authority of the Shipping Act and its 1961 amendment" can mean only that the court will examine the statutes to see whether they conferred a rulemaking authority upon the agency.

Petitioners submit that no regulatory agency has so vast a power. It may issue rules, but this is not the power to make law. No such power can be delegated by Congress. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129. The rule must have a basis in law and must be within the granted authority. *Social Security Board* v. *Nierotko*, 327 U. S. 358. Should the holding below become final, it would mean that forwarders—unlike any other business group—will have the regulatory agency, instead of Congress, determine what acts they can do and what they may not do with no statutory guidelines whatsoever. Only by a review by this Court may this egregious error be corrected.

Should certiorari be granted and this Court adhere to its prior decisions, namely, that the practice to be regulated must be in violation of a substantive provision of law, then petitioners submit that each of the rules sustained by the Court of Appeals must be set aside. Only in one case, § 510.23(j), did the court below specifically hold that the practice violated the Shipping Act and petitioners believe that this holding was error. The reasons why each rule is unlawful are briefly set forth below.[3]

[3] For brevity, this petition will not treat that portion of the decision below dealing with § 510.24(e), Subpart B.

II

The Court Below Erred In Holding that the Term "Beneficial Interest", as added to the Shipping Act by P. L. 87-254, Means "Any Interest".

The 1961 amendment to the Shipping Act (75 Stat. 522) precludes any person from engaging in the business of ocean freight forwarding unless he holds a license issued by the Commission (App. C, p. 55). Such a license may be issued to a person who is an "independent ocean freight forwarder", that is, one who is not a shipper of shipments to foreign countries, nor has any beneficial interest therein (App. C, p. 55).

In § 510.21(1) the Commission has defined the term "beneficial interest" to include "any lien interest" arising by the "financing of the shipment" (App. D, p. 62), thus barring a forwarder from being licensed when he advances the purchase price of goods either on behalf of an American exporter or overseas consignee. The Court of Appeals has sustained the rule on the ground that it was "reasonable and necessary to prevent forwarders from selling goods under the guise of 'financing' and then using this subterfuge to receive a discounted freight rate" (App. A, p. 32).

A principal purpose of P. L. 87-254 was to authorize the compensation of a forwarder by an ocean carrier, such compensation being traditionally known as "brokerage", when specified services were performed (App. C, p. 57). To prevent illegal rebating, however, Congress stipulated that no one could be licensed as a forwarder and thereafter receive brokerage if he were a shipper or had a beneficial interest in the merchandise. The court below properly noted that Congress intended "to prevent the illegal rebating that occurs when brokerage is received by forwarders who are also shippers, shipper owned or shipper

connected, or who have a *beneficial interest* in shipments'' (App. A, p. 31). But after correctly stating the legislative intent, the court, entirely without basis, later concluded that it was the Congressional purpose to correct the practice of ''the collection of compensation from carriers by persons who have *any interest* in the goods being shipped'' (App. A, p. 32).

It is axiomatic that a lien is not a beneficial interest. A lien is a charge on the property to secure payment for an obligation. *Ansonia National Bank* v. *U. S.*, 147 F. Supp. 864. It is merely a right to retain possession until the debt is paid. Black's Law Dictionary, 1933 Ed., p. 1114. This legal right is to be sharply distinguished from a beneficial interest, which this Court has said is the right to the use or enjoyment of property by one person where legal title is in another. *Montana Catholic Missions* v. *Missoula County*, 200 U. S. 118, 127-128.

The court below thus unjustifiably extended the meaning of ''beneficial interest'' to include ''any interest''. By so construing the term, the effect of § 510.21(1) is to bar a forwarder from advancing the invoice price of a shipment even though the practice is not *per se* unlawful. The rule thus exceeds the Commission's power. *F. C. C.* v. *American Broadcasting Co.; California* v. *U. S., supra.* It denies to our export trade a useful, efficient and inexpensive mechanism for promoting overseas sales—the financing activities of forwarders.

Nor was the Court of Appeals justified in sustaining the rule allegedly to prevent the use of financing as a subterfuge to obtain a rebate (App. A, p. 32). The court acknowledged that an agency must be supported by substantial evidence (App. A, p. 28). Yet, in none of the proceedings to date was there evidence of *a single instance* where such subterfuge had been used. The court's affirmance was based on pure speculation that a lawful activity might conceivably be used in an illegal way, hardly a proper basis for the rule.

III

In Sustaining § 510.22(a) the Court Below Has Permitted Compensation Lawfully Earned to Be Denied To a Forwarder Because He Performs An Act Not Prohibited by Law.

Under this rule (App. D, p. 62) a forwarder in New York who requests an ocean carrier in another port (an "outport") to perform a single forwarding service, where the services of other forwarders are available, would be denied brokerage from the carrier even though the New York forwarder has rendered services which by law merit such compensation (46 U. S. C. §841b(e); App. C, p. 57). The Court of Appeals held that § 510.22(a) was "reasonable and necessary to prevent the erosion of the freight forwarder industry at ports other than New York" (App. A, p. 35).

A New York forwarder on occasions determines that the shipment of his customer should be exported through an outport. The forwarder will render the usual services that entitle him to brokerage from the carrier, but at the outport it may be necessary for one or more shipping documents to be completed, which service the forwarder in New York may ask the carrier at the outport to do. If the carrier does, and forwarders are available for such work at the outport, the rule will have the effect of denying substantial revenue to New York forwarders.[4]

The Court of Appeals felt that the purpose of the challenged regulation, as evidenced from the prior investigations of the industry, was to prevent New York forwarders from manipulating freight to the lesser ports in order to have the carriers perform services, *without charge*, normally executed by a forwarder (App. A, p. 33). In so concluding the court has erred. It is not the purpose of the

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[4] See affidavit of W. Fischer attached to New York Association Petition for Reconsideration, Certification of Record, Item 81.

New York forwarders in challenging the rule to obtain forwarding services from carriers at the outports without charge. The rule specifically states that a carrier who performs forwarding services must assess a charge in accordance with published tariffs filed with the Commission (App. D, p. 62). This portion of the rule was not objected to by petitioners herein. Thus, the Court's basis for upholding the rule—"free forwarding" by carriers—no longer exists.

A carrier is not barred by the Shipping Act, as amended by P.L. 87-254, from performing freight forwarding services, a fact which the Commission recognized in § 510.22(a) by providing that a carrier could perform services without a license with respect to cargo carried under its own bill of lading. Thus, when a carrier in an outport performs a forwarding service, such as the completion of its bill of lading, at the request of a New York forwarder, the carrier is not engaging in illegal conduct. This being so, a rule which denies brokerage to a forwarder who has met the statutory qulifications is without a proper legislative basis and is necessarily unlawful. *F.C.C.* v. *American Broadcasting Co.; California* v. *U. S., supra.*

Even if it is assumed that the Commission's avowed purpose of preventing the erosion of the forwarding industry in the outports is reasonable, nevertheless, it is undisputed that the statute does not, expressly or impliedly, prohibit a New York forwarder from using a carrier at an outport for forwarding services. The unilateral policy determination by the Commission that a forwarder may use a carrier only on penalty of losing earned revenue is not proper rulemaking; it is "a legislative act" and, therefore, unlawful. *Local 357, International Brotherhood of Teamsters, etc.* v. *N.L.R.B.*, 365 U. S. 667, 674.

IV

In Sustaining § 510.23(j) the Court Below lHas Failed to Follow Long Standing Precedent as to the Measure of Proof Under the "Undue Preference" Provision of the Shipping Act.

This rule requires a forwarder to show separately on his invoice to his shipper clients "the premium cost" for insurance arranged under the forwarder's own open marine policy and "the charge for each accessorial service performed" (App. D, p. 63). A similar breakdown would be required for other accessorial services, such as trucking and warehousing. As previously noted, the present practice is for the forwarder to show the accessorial service as one item on his invoice to the shipper, such as "Insurance Placing Service". By requiring a breakdown between cost and gross profit the rule will in many instances deny to forwarders in New York revenue necessary for a profitable operation.[5]

In sustaining the rule the Court of Appeaals concluded that the Commission could properly rely upon earlier findings in its investigations of the forwarding industry (App. A, p. 37). Evidence in such investigations showed that in the billing of customers for accessorial services the service fee charged by some forwarders over and above the disbursement varied from shipper to shipper. The court concluded that the prior agency finding of such variance in fees constituted "substantial evidence" sufficient "to establish discrimination in violation of Section 16 (First)." (App. A, p. 37).

Petitioners argued below that Section 16 (First) is violated only when (1) two shippers are given unequal treatment (2) the shippers are competitors and (3) the prefer-

[5] See affidavit of V. Wortman, attached to Petition for Reconsideration of New York Association, Certification of Record, Item 81.

ence to one or disadvantage to the other is the proximate cause of an injury. While evidence in the prior investigations showed that some shippers were being charged varying amounts for accessorial services, neither the Commission or the Court of Appeals has disputed the position of petitioners that there was *no evidence whatsoever* to establish that the shippers of the particular forwarder involved were competitors or that any difference in the service fees charged resulted in a preference to one shipper or disadvantage to the other, causing damage.

In its opinion the Court of Appeals did not take issue with our contention as to the evidentiary prerequisite for a Section 16 violation. The authorities are clear. See: *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541; *Huber Mfg. Co.* v. *N.V. Stoomvaart Mattschappij "Nederland"*, 4 F.M.B. 343, 347; *Flota Mercante Grancolombiano* v. *F.M.C.*, 302 F. 2d 887, 895; *Agreement 8765 Gulf/Mediterrean Trade*, 7 F.M.C. 495, 500. The court below found, however, that these authorities were inapposite on the theory that they dealt with charges by ocean carriers or terminal operators, the other two persons subject to the act, and that to find unlawful discrimination with respect to these persons "quite properly requires a showing of competitive relationship between two shippers who are charged different prices." (App. A, p. 37). Forwarders were placed in a different category by the court. It said that they "render substantially the same services to all shippers in procuring insurance or arranging for cartage; the commodity being shipped has little or nothing to do with the reasonableness of the fee exacted for the forwarder's services." (App. A, p. 37). Accordingly, the court concluded that a competitive relationship need not be shown in the case of forwarders to establish a Section 16 (First) violation (App. A, p. 38).

Petitioners submit that the purported factual distinction as to the nature of the services rendered between car-

riers and terminal operators on the one hand and forwarders on the other made by the court below is wholly without merit. The claim is that the forwarders, unlike the other two, "render substantially the same services to all shippers" and that by reason thereof a competitive relationship need not be shown. In fact, a carrier who transports an identical product of two shippers is rendering substantially the same service to each shipper. The carrier loads, transports and unloads the products of each in precisely the same way. Similarly, the wharfinger who permits the use of his terminal renders the same services to each shipper. It would seem clear, therefore, that the distinction sought to be made by the court is factually wrong and may not properly serve as the basis to distinguish the measure of proof required to show a Section 16 (First) violation by a forwarder.

In essence, what the court below held was that forwarders violate Section 16 (First) when they charge different fees to shippers.[6] The court's position that a disparity in fees, standing alone, is a violation of Section 16 (First) has been uniformly rejected by the Commission. A mere showing of a difference in rates has never constituted an undue preference under Section 16 (First). See: *Johnson Pickett Rope Co.* v. *Dollar S.S. Lines, Inc., et al.*, 1 U.S.S.B.B. 585, 587; *Neuss, Hesslein & Co., Inc.* v. *Grace Line, Inc., et al.*, 2 U.S.M.C. 3, 5; *Puerto Rican Rates*, 2 U.S.M.C. 117, 119.

The basic error of the court below is its conclusion, *unsupported by the citation of a single case*, that "discrimination" *per se* is a violation of Section 16 (First). The word "discrimination" is nowhere to be found in the portion of Section 16 pertaining to forwarders (App. C, p. 54). Rather, the section prohibits the conferring of

[6] Unlike carriers, forwarders are not required to publish and file their rates, nor is there any statutory requirement of a uniform rate.

"undue or unreasonable preference" on one person or subjecting another to "undue or unreasonable prejudice." This is not a mandate of absolute equality of treatment. "The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable." *Texas and Pacific Ry.* v. *I. C. C.*, 162 U. S. 197, 219; *Intercoastal Cancellations and Restrictions*, 2 U. S. M. C., 397, 400.

In adopting "discrimination" alone as the test, the Court of Appeals has not only departed from established precedent under the Shipping Act but also under other transportation statutes containing an "undue preference" provision. Section 3(1) of the Interstate Commerce Act (49 U. S. C. § 3 (par. 1)) is virtually identical to and the forerunner of Section 16 (First) of the Shipping Act. The Interstate Commerce Commission has uniformly construed this provision to require a showing of competition between shippers and damage. *Guyton and Harrington Mule Co.* v. *L. & N. R.R. Co.*, 50 I. C. C. 546, 551; *Duluth Chamber of Commerce* v. *St. Paul M. & O. Ry.*, 122 I. C. C. 739, 742-743. This Court has likewise recognized that a mere difference in the rates charged is not a breach of the law. *Texas and Pacific Ry.* v. *I. C. C., supra; I. C. C.* v. *Balt. & O. R. Co.*, 43 F. 37, aff'd 145 U. S. 263; *Ayrshire Corp.* v. *U. S.*, 335 U. S. 573, 592. This Court has also held that the Shipping Act in its general scope and purpose closely parallels the Interstate Commerce Act and that the settled construction under the Interstate Commerce Act must be applied to the Shipping Act. *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U. S. 474, 481.

Section 16 (First) is a penal statute and as such it must be strictly construed. The interpretation given to this section by the Commission and affirmed by the Court of Appeals would likewise apply in a criminal case. *F. C. C.* v. *American Broadcasting Co., supra*, p. 296. If the court below was correct in its view as to the prerequisites of proof under Section 16 (First) with respect to forwarders, it would mean that there would be two standards of respon-

sibility in a criminal prosecution, one for forwarders and another for carriers and terminal operators—a palpably wrong result. There is no cogent reason why the long accepted measure of proof for a Section 16 (First) violation should apply to carriers and terminal operators but not to forwarders. In establishing a separate and lesser standard of proof for forwarders, the Court of Appeals has radically and without warrant departed from the interpretation of "undue preference" provisions of transportation laws first enunciated more than one hundred years ago under the English railway acts and followed by our courts ever since. See *Texas and Pacific Ry.* v. *I. C., supra.*

V

In Upholding § 510.25(a) the Court of Appeals Incorrectly Applied a Decision of this Court with the Result that a Forwarder will be Compelled to Violate the Shipping Act.

Section 510.25(a) requires a licensee to show to a "bona fide shipper" any "special contract" that a forwarder has made with his customer (App. D, p. 64). A special contract is defined in § 510.21(j) as one which provides for "lump sum forwarding charges, monthly retainer fees, or similar arrangements that may exist between a principal and a licensee" (App. D, p. 62).

The court below found the rule to be "a reasonable vehicle for enforcing compliance with Section 16's prohibition against a forwarder 'unduly or unreasonably preferring or discriminating' against any person." (App. A, p. 42). In so doing, the court rejected petitioners' argument that the regulation requires the disclosure of confidential business dealings and compels the forwarder to reveal information to a third party in violation of Section 20 of the Shipping Act (46 U. S. C. § 819, App. C, p. 54).

A special contract usually arises when a forwarder undertakes to dispatch an unusual shipment, such as the movement over a period of time of the materials required to construct an entire manufacturing plant overseas. The contract between the forwarder and the exporter, of necessity, identifies the nature of the traffic to be shipped, it sets forth the destination, it names the consignee and contains other information specifically mentioned in Section 20 of the Act. The forwarder's compensation is usually fixed on an overall basis and would be a "lump sum charge" under the definition of a special contract. It seems obvious that there would be a violation of the confidentiality requirement of Section 20 when a forwarder is compelled by the rule to permit a competitor of his customers upon demand to examine such a contract.

The Court of Appeals also erred in concluding that a forwarder's charges can never be confidential "given the public nature of his already carefully regulated calling," citing *Smith* v. *I. C. C.*, 245 U. S. 33 (App. A, p. 43). The court below has misconstrued the case. It dealt *only* with the I. C. C.'s power to require a regulated person to reveal financial details *to the agency itself*. The case did not hold that such confidential matters must on demand be disclosed to a third person competing with the forwarder's customer. There is a vast difference between requiring a disclosure to authorized Commission personnel, a requirement contained in a portion of the rule herein to which petitioners have not objected, and compelling a forwarder to reveal confidential information to outside parties.

The court below did not conclude that it was unlawful for a forwarder to refuse to reveal his special contractual arrangements with his customer. Absent such finding, the Commission is without authority to promulgate a rule requiring such disclosure. *F. C. C.* v. *American Broadcasting Company*; *California* v. *U. S.*, *supra*. The rule not

being corrective of an unlawful act, the Court of Appeals was clearly in error in holding that a rule was a reasonable vehicle for "enforcing compliance" with the statute (App. A, p. 42).

Conclusion

Petitioners respectfully submit that the issues herein should be resolved with finality by the Court at this time. P. L. 87-254, as added to the Shipping Act of 1961, is a new law. The Commission has interpreted this law in a manner that will cause irreparable injury to a substantial portion of the industry. Financing activities, long a useful mechanism in our export commerce, have been barred. Lawfully earned compensation is denied. Ancient precedent as to what constitutes "undue preference" under the Shipping Act has been rejected. Forwarders are being required to reveal confidential information in violation of law. All this is being accomplished by the Commission under an interpretation by the Court of Appeals as to the extent of the agency's rulemaking authority in sharp variance with the decisions of this Court.

By reason of the foregoing, petitioners believe that at the very outset of the Commission's regulatory function under the new statute the extent of its authority should be authoritatively defined by this Court. Failing a review by this Court, an industry, recognized as essential to our export commerce, will be dealt a crippling blow, much to the detriment of not only forwarders but all other segments of this nation's foreign commerce.

Wherefore, petitioners respectfully pray that this Court issue a writ of certiorari to the U. S. Court of Appeals for the Second Circuit to review its judgment herein.

Respectfully submitted,

GERALD H. ULLMAN,
Attorney for Petitioners.

APPENDIX A

1. Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 34, 35, 36—September Term, 1964.

(Argued September 23, 1964 Decided October 14, 1964.)

Docket Nos. 28229, 28306, 28307

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC., INGE AND COMPANY, INC., BARR SHIPPING COMPANY, INC., MAJOR FORWARDING COMPANY, INC., and JOHN H. FAUNCE, INC.,

Petitioners,

—v.—

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents,

PHILADELPHIA FREIGHT BROKERS, FORWARDERS AND CUSTOM BROKERS ASSOCIATION, INC., BALTIMORE CUSTOM HOUSE BROKERS AND FORWARDERS ASSOCIATION, FOREIGN COMMERCE CLUB OF BOSTON, INC., and EXPORT AND IMPORT FORWARDING ASSOCIATION OF VIRGINIA,

Interveners.

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC.,
Petitioner,

—v.—

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents.

FARRELL SHIPPING CO., INC.; FARRELL BROS. BROKERAGE, INC.,
Petitioners,

—v.—

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents.

Before:

MOORE, SMITH and KAUFMAN,
Circuit Judges.

Consolidated petitions for review of order of the Federal Maritime Commission. Petitioners challenge the validity of six regulations implementing the Freight Forwarder Law of 1961.

Order affirmed.

GERALD H. ULLMAN, *for petitioners* (No. 28229).

JAMES F. YOUNG, Philadelphia, Pa. (Eugene R. Lippman, Mark D. Alspach, Krusen, Evans & Byrne, on the brief), *for interveners* (No. 28229).

CHARLES S. HAIGHT, of Haight, Gardner, Poor & Havens, New York, N. Y. (Thomas K. Roche, Sanford C. Miller, William F. Faison, on the brief), *for petitioner* (No. 28306).

DONALD D. WEBSTER, of Hogan & Hartson, Washington, D. C., *for petitioners* (No. 28307).

JEROME B. BLUM, of Federal Maritime Commission, Washington, D C. (James L. Pimper, General Counsel; Robert E. Mitchell, Deputy General Counsel; William H. Orrick, Jr., Assistant Attorney General; Arthur J. Murphy, Jr., Department of Justice, on the brief), *for respondents.*

KAUFMAN, *Circuit Judge*:

In these consolidated appeals ocean freight forwarders, individually and through trade associations,[1] question the validity of six regulations issued by the Federal Maritime Commission. The regulations, which implement the Freight Forwarder Law of 1961, 75 Stat. 522, 46 U. S. C. §§ 801, 841a, 841b, generally concern "brokerage" payments from

[1] The regulations are challenged by the New York Foreign Freight Forwarders and Brokers Association, Inc., National Customs Brokers & Forwarders Association of America, Inc., Inge and Company, Inc., Barr Shipping Company, Inc., Major Forwarding Company, Inc., John H. Faunce, Inc., Farrell Shipping Co., Inc., and Farrell Bros. Brokerage, Inc. The New York Association is composed of approximately 110 ocean freight forwarders conducting their business primarily through the Port of New York. The members also do a substantial business in the other major ports of the United States, either through branch offices or corresponding forwarders. National Customs Brokers is a membership corporation with some 350 members located throughout the United States and some 200 members abroad.

ocean carriers to forwarders and the forwarders' methods of billing shippers.

Our discussion of the regulations will be clearer if the duties of a forwarder are first brought into focus. Most American exporters use the services of ocean freight forwarders who, in essence, act as export departments for their shipper clients. An exporter who ships goods abroad customarily consigns the merchandise to a forwarder who then makes all arrangements for dispatch to a foreign port. Thus, the forwarder will secure cargo space with a steamship company, give advice on governmental licensing requirements, proper port of exit and letter of credit intricacies, and arrange to have the cargo reach seaboard in time to meet the designated vessel. The forwarder also prepares required shipping documents, including the dock receipt, delivery order, bill of lading, export declaration and the consular invoice required on shipments to certain countries.

Often the forwarder performs so-called accessorial services, such as arranging insurance either under his own policy or the exporter's open marine policy. He may provide for local trucking of less than carload parcels to the pier and occasionally he will store partial shipments. To reimburse himself for the cost of arranging these accessorial services the forwarder charges the shipper a fee greater than his actual disbursement.

Most forwarders receive their revenues from two sources. They are paid by shippers for the various forwarding services performed and on many shipments forwarders receive, in addition, brokerage payments from ocean carriers.

Despite the forwarders' valuable role in relieving exporters of the many details and formalities of foreign trade and facilitating the flow of water-borne commerce, certain activities within the industry have been scrutinized by public agencies and found objectionable. Criticism has focused

primarily on the forwarders' activities as brokers and the payments received for such brokers' services from ocean carriers as well as the forwarders' methods of billing shippers.

The history of public investigation begins in 1942 when the Maritime Commission instituted a probe, under the 1916 Shipping Act, 39 Stat. 728, 46 U. S. C. § 801, into the propriety of forwarder practices at the Port of New York. The proceedings were temporarily sidetracked when the forwarders challenged the agency's statutory authority to regulate their industry's activities. The Maritime Commission's jurisdiction was upheld in *United States* v. *American Union Transport, Inc.*, 327 U. S. 437 (1946), when the Supreme Court concluded that foreign freight forwarders, even though not contractually or corporately affiliated with a common carrier by water, are subject to the Shipping Act's regulatory provisions.

The Court pointed out that forwarders are "agents of the shipper," intimately related to both shipper and carrier as a "go-between," and that "considerations of policy and history" called for their inclusion within the regulatory scheme. 327 U. S. at 443, 445, 450. In Mr. Justice Rutledge's words:

> Section 16 forbids various forms of discrimination, as well as other practices, on the part of any common carrier by water "or other person," which an independent forwarder readily may commit or induce . . . [S]ome of the practices forbidden appear to be peculiarly if not exclusively susceptible of commission or inducement by forwarders, brokers and shippers' agents, all specifically mentioned in the section.
>
> The purpose of § 17, in relevant part, is to provide for the establishment, observance and enforcement of just and reasonable regulations and practices relating to or in connection with the receiving, han-

> dling, storing or delivering of property. By the nature of their business, independent forwarders are intimately connected with these various activities. Here again, unless the Commission has jurisdiction over them, it may not be able effectively to carry out the policy of the Act. 327 U. S. at 447-49.

After the Supreme Court's decision the Maritime Commission completed its investigation, *Port of New York Freight Forwarder Investigation,* 3 U. S. M. C. 157 (1949), and on May 18, 1950, issued regulations governing forwarder billing practices, special contracts between forwarders and shippers or consignees, and brokerage payments. 46 C. F. R. Part 244. In 1954 the agency began a second broad study of the forwarding industry. Some seven years later, on June 29, 1961, a comprehensive report was published, together with regulations to become effective after 120 days. *Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders,* 6 F. M. B. 327.

In the course of these extensive probes the maritime agency uncovered certain disturbing improprieties in forwarder billing methods; charges for accessorial services, for example, were marked up "in a random fashion." The 1961 report concluded that "discrimination, preference, and prejudice is the rule" in the assessment of forwarder charges and is unlawful absent justification. Accordingly, the 1950 regulations were modified "to prohibit the assessment of disguised markups in all instances which are shown on this record to result in violation of sections 16 and 17 of the Act." 6 F. M. B. at 359, 365.

The agency also investigated and analyzed brokerage payments from carriers to forwarders. After pointing out that forwarders are engaged by shippers to carry out shipper responsibilities, the Commission held that forwarders are generally not brokers in their relations with

carriers. Nevertheless, according to the study, the carriers paid brokerage fees without ascertaining whether the forwarders had performed any services and without determining if forwarder-shipper relationships would make the payments illegal rebates under section 16. Having concluded that brokerage fees led forwarders to discriminate among shippers in violation of sections 16 and 17 of the Shipping Act, the agency resolved to prohibit brokerage payments covering cargo with respect to which forwarding services had been rendered.

Reaction from the freight forwarding industry followed swiftly and took the form of efforts to secure Congressional legislation which came to fruition in the Freight Forwarder Law, enacted September 19, 1961. 75 Stat. 522, 46 U. S. C. §§ 801, 841a, 841b. Congress' remedy for the industry's malpractices stopped short of the agency's proposed total ban on brokerage payments. Instead, compensation from carriers was authorized only where the forwarder renders specified services of value and issues a certificate to that effect. Additionally, forwarders would be licensed and other safeguards provided to enable the Maritime Commission to cure the abuses and undesirable practices uncovered in its extensive investigations.

Under the 1961 Law a common carrier may "compensate" a licensed forwarder "when, and only when" he has performed—and certifies to the carrier that he has performed—"the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging space for, such cargo" plus at least two out of five additional enumerated services. 46 U. S. C. § 841b(e). Moreover, a license is now required as a prerequisite to engaging in the forwarding business. 41 U. S. C. § 841b(a). A forwarder licensee must be "independent"—free of any affiliation with a shipper, consignee, seller, purchaser of the shipment, or with any person having a beneficial interest in the goods, 46 U. S. C. § 801—in order to eliminate in-

direct rebates to shippers. Finally, the Maritime Commission is directed to prescribe "reasonable rules and regulations" to be observed by forwarders. 46 U. S. C. § 841a.

The Commission heeded this mandate and commenced a new rule-making proceeding. In December 1961 the agency issued regulations, without objection from the forwarders, setting forth the procedure for obtaining a forwarder's license. Shortly thereafter, in February 1962, proposed rules regulating the "Practices of Independent Ocean Freight Forwarders, Ocean Freight Brokers, and Oceangoing Common Carriers" were published. After reviewing the comments of interested parties, the Commission revised some of the proposed rules and republished them in January 1963. Further comments were received and the Commission heard oral arguments respecting those rules challenged by the forwarding industry. Finally, by order dated April 2, 1963, published in the Federal Register of May 1, 1963, 28 Fed. Reg. 4300, Maritime Commission gave notice that, after further revision, the proposed rules had been adopted and would become effective June 1, 1963. On May 21, 1963, the Commission denied petitions by freight forwarders to reconsider certain of the adopted rules.

Having exhausted their administrative remedies, the aggrieved freight forwarders filed petitions with this Court and the Court of Appeals for the District of Columbia Circuit seeking judicial review of six of the proposed regulations. On May 28, 1963, we issued an interlocutory injunction restraining the Commission from putting into effect the challenged rules until thirty days after the determination of this appeal. The District of Columbia proceedings have been transferred to this Court pursuant to 28 U. S. C. § 2112(a), and the several cases have been consolidated. Our jurisdiction derives from the Administrative Procedure Act, 64 Stat. 1129 (1950), 5 U. S. C. §§ 1031-42 (1958).

The six challenged regulations may be briefly summarized: (A) Section 510.21(l) defines "any lien interest" therein. (B) Section 510.22(a) prohibits a forwarder from collecting compensation from a carrier where the carrier performs part of the forwarding services. (C) Section 510.23(j) requires a forwarder to itemize or state separately on his bill his actual expenditures on the shipper's behalf as well as the charges or fees assessed for his own services. (D) Section 510.24(e) requires the forwarder to certify to the carrier, as to each shipment, which of the services specified in Section 44(e) of the 1964 Law he has performed. (E) Section 510.24(g) prohibits a licensed forwarder, and any person or firm in which he has a beneficial interest, from charging or collecting "any compensation or brokerage" from a carrier with respect to non-bulk cargo, unless the forwarder has performed the minimum services specified in Section 44(e). (F) Section 510.25(a) provides that forwarders, upon reasonable request, must disclose to Maritime Commission personnel or bona fide shippers, special contracts or arrangements with shippers.[2]

I.

Orderly procedure requires that we first define this court's limits in adjudicating the validity of the challenged

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[2] The challenged regulations appear in full at 28 Fed. Reg. 4300 (1963).

The New York Association objects to all of the rules except Section 510.24(g). Farrell Shipping and Farrell Bros. Brokerage objects only to 510.24(g). National Customs Brokers contests only Section 510.23(j).

On September 4, 1963, we granted leave to intervene to Philadelphia Freight Brokers, Forwarders and Custom Brokers Association, Inc., Baltimore Custom House Brokers and Forwarders Association, Foreign Commerce Club of Boston, Inc., and Export and Import Forwarding Association of Virginia. The interveners represent the majority of persons and businesses engaged in freight forwarding in the ports of Boston, Philadelphia, Baltimore, and Norfolk-Newport News. The interveners have urged that we uphold Rule 510.22(a).

regulations. In doing so we should consider the contentions respecting our scope of review. The New York Association maintains that the Maritime Commission's rule-making authority is limited to correcting practices found to violate the regulatory provisions of the 1916 Shipping Act. If, according to this view, a practice sought to be regulated is not contrary to a substantive provision of the 1916 Act, then, it is urged, the regulation is invalid. We do not agree with this restrictive view of the agency's powers.

Judge Frank ...sulized the standards that govern our review in *United States* v. *Obermeier*, 186 F. 2d 243 (2d Cir. 1950), *cert. denied*, 340 U. S. 951 (1951). He wrote that "(1) A regulation is presumptively valid, and one who attacks it has the burden of showing its invalidity. (2) A regulation or administrative practice is ordinarily valid unless it is (a) unreasonable or inappropriate or (b) plainly inconsistent with the statute." See also *Grace Line, Inc.* v. *Federal Maritime Board*, 263 F. 2d 709, 711 (2d Cir. 1959). Michael Obermeier had been convicted for knowingly making a false statement under oath in an administrative, pre-naturalization-petition examination. He claimed that he committed no crime because the oath was administered without explicit statutory authority. The court rejected this view, holding that the regulations, which went beyond the Naturalization Act in authorizing an oath in examinations held before filing a petition for naturalization, were "eminently reasonable and appropriate." 186 F. 2d at 248. The Administrative Procedure Act, § 10(e), 5 U. S. C. § 1009, articulates the test in this fashion: agency rules may not be arbitrary, capricious or an abuse of discretion or unsupported by substantial evidence.

Our limited scope of review, established by judicial decisions and the A. P. A., is based on a realistic view of the legislative process. Congressional legislation does not

undertake to deal with every specific evil for some are unforeseeable; instead Congress often creates an administrative agency to allow application of expert's familiarity with the problems involved. The Supreme Court carefully explained the necessary and proper function of agency rule-making in *American Trucking Ass'ns, Inc.* v. *United States,* 344 U. S. 298 (1953). The Interstate Commerce Commission had issued rules prohibiting short-term or trip-leasing by motor carriers. The Court held that promulgation of the rules was within the Commission's power, despite the absence of specific reference to leasing practices in the Motor Carrier Act. Mr. Justice Reed's words deserve quotation:

> All urge upon us the fact that nowhere in the Act is there an express delegation of power to control, regulate or affect leasing practices, and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellant's contentions if we thought it a reasonable canon of interpretation that the draftsman of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 219-220; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 193-194. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to

> their work the expert's familiarity with industry conditions which members of the delegating legislature cannot be expected to possess. *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612. [344 U. S. 298, 309-10.]

The New York Association also suggests that the rules do not contain "a concise general statement of their basis and purpose" in compliance with Section 4(b) of the Administrative Procedure Act, 5 U. S. C. § 1003(b). But the order promulgating the rules meets the statutory requirement in stating that they implement the 1961 Law "and have for their purpose the establishment of standards and criteria to be observed and maintained by licensed independent ocean freight forwarders, ocean freight brokers and oceangoing common carriers in the conduct of their business affairs."

Finally, we cannot ignore the Maritime Commission's responsibility to enforce the overall objectives of the 1916 Shipping Act. Mr. Justice Frankfurter defined the broad scope of this obligation in *State of California* v. *United States*: "Finding a wrong which it is duty-bound to remedy the Maritime Commission, as the expert body established by Congress for safeguading this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing." 320 U. S. 577, 584 (1944). The same thought was expressed more recently:

> The great complexity of our economy induced Congress to place the regulation of businesses like foreign shipments in specialized agencies with broad powers. The courts are slow to interfere with the conclusions of such agenices when reconcilable with statutory directions. *American Union Transport, Inc.* v. *United States*, 257 F. 2d 607, 612 (D. C. Cir.), *cert. denied*, 358 U. S. 828 (1958).

II.

With this background we now consider whether the six challenged regulations are reasonable and consistent with the authority granted in the 1916 Shipping Act and the 1961 Freight Forwarder Law.

A. *Section 510.21(l)*

Section 1 of the 1916 Shipping Act, as amended by the Freight Forwarder Law of 1961, defines an "independent ocean freight forwarder" as "a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest." 46 U. S. § 801. Licensed forwarders must be truly independent of shippers and not have any beneficial interest in shipments in order to prevent the illegal rebating that occurs when brokerage is received by forwarders who are also shippers, shipper-owned or shipper-connected or who have a beneficial interest in shipments. To fulfill this objective Rule 510.21(l) defines "beneficial interest" to include "any lien interest" of a forwarder "arising by the financing of the shipment."

The New York Association argues that the rule is unlawful because it seeks to regulate forwarder financing activities which do not violate any provision of the Shipping Act. But Congress by its legislation in 1961 rejected this contention, and showed a clear intention to separate forwarders completely from all shipper interests. Legislation proposed by the forwarder industry sought to define "beneficial interest" to exclude a lien interest. However, the phrase "other than a lien," urged upon Congress by the forwarders, was deleted from the words "beneficial interest

therein other than a lien" submitted by them. Congress apparently accepted the agency's position that "a lien on a shipment could give a freight forwarder sufficient beneficial interest in the shipment to cause payments thereon by the carrier to the forwarder to be a form of indirect rebate of the freight." Senate Report No. 691, 87th Cong., 1st Sess., p. 4. We are not convinced that this legislative history should be ignored simply because of the suggestion that the urgent need for new legislation led the industry to accept the change without objection.

It is interesting that the rule also provides that "any obligation arising in favor of a licensee by reason of advances of out-of-pocket expenses incurred in dispatching of shipments shall not be deemed a beneficial interest." We find the distinction thus drawn between a lien arising from financing and one created by a forwarder's out-of-pocket expenses eminently reasonable. The forwarder routinely incurs out-of-pocket expenses in carrying out his functions for the shipper; he is usually reimbursed soon after the goods reach their destination. Indeed, the 1961 Law expressly lists "payment of the ocean freight charges" as a function a freight forwarder may perform and a basis for his receipt of compensation. 46 U. S. C. § 841b(e)(5). On the other hand, the financing of export shipments belongs primarily to the exporter or a financial institution, not to the independent ocean freight forwarder.

Although the challenged rule may limit some benign financing activities by forwarders, it provides a means to curb an evil Congress sought to correct—the collection of compensation from carriers by persons who have any interest in the goods being shipped. We hold that the rule is reasonable and necessary to prevent forwarders from selling goods under the guise of "financing" and then using this subterfuge to receive a discounted freight rate.

B. *Section 510.22(a)*

The contested portion of this rule provides that "No licensee may charge or collect compensation in the event he requests the carrier or its agent to perform any of the forwarding services set forth in * * * [section 44 of the 1961 Law] unless no other licensee is willing and able to perform such services." The Maritime Commission thereby seeks to prohibit a forwarder from collecting compensation from a carrier if the carrier, at the forwarder's request, has performed part of the freight forwarding service.[3]

The New York Association urges that the rule is contrary to the 1961 Law because it may deprive a forwarder of compensation even though he has rendered sufficient services under section 4(e). The forwarders direct our attention to the absence of specific statutory language prohibiting the rendering of free services by carriers in addition to the payment of brokerage. But this narrow approach ignores the Commission's responsibility to enforce the broad objectives of the Shipping Act of 1916.

We find Section 510.22(a) reasonable and necessary to prevent the erosion of the freight forwarder industry at ports other than New York. The rule seeks to prevent forwarders in the larger ports, pro control cargo routing, from bypassing forwarders in the lesser ports. The development and free flow of this nation's foreign commerce requires that local freight forwarders be available at all ports; achievement of that goal will be frustrated if carriers or their agents perform services at the lesser ports for forwarders located in New York.

The forwarding industry's history fully supports this conclusion. Absent the challenged regulation, the New York

[3] In denying the forwarders' petitions for reconsideration of the rule the Commission declared that § 510.22(a) "will not be interpreted to require that a carrier deny compensation where a forwarder requests but the carrier does not render the services requested."

forwarders, because of their power to control cargo routing, can and do manipulate freight to the lesser ports in order to have the carriers perform services, without charge, normally executed by a forwarder. This practice deprives the lesser-port forwarders of fees, at the same time there is no reciprocity for these forwarders in New York. In its 1961 report the maritime agency wrote that:

> In order to avoid, where possible, the necessity of splitting brokerage payments, the New York forwarders have * * * entered into arrangements with the ocean carriers under which the work necessary to complete forwarding services * * * is accomplished by the ocean carriers without charge at ports such as Boston and Baltimore, and * * * Charleston and Savannah. Pursuant to these arrangements, the New York forwarders have diverted cargo from New Orleans to Savannah and Charleston in order to avoid the splitting of brokerage with New Orleans forwarders, because carriers have refused to perform outport forwarding services * * * at New Orleans. The forwarders at Boston and Baltimore have requested that the carriers discontinue their performance of free forwarding services for the New York forwarders, or alternatively that like services be performed at New York on behalf of the Boston and Baltimore forwarders, but these requests have been refused. 6 F. M. B. 327, 345.

In this connection we note that the New York forwarders' approximately sixty percent share of the shipments handled by the industry, 6 F. M. C. 327, 337 (1961) seems grossly disproportionate when compared with the fact that export tonnage passing through New York in 1961 was only twenty percent of the combined export tonnage of Boston, Philadelphia, Baltimore, and Norfolk-Newport News. 1962 Statistical Abstract of the United States, p. 600.

The challenged rule represents a reasonable effort by the Maritime Commission to fulfill its affirmative duty to implement the national maritime policy. Section 44(b) of the Shipping Act, 46 U. S. C. § 841(b), establishing the licensing requirement for freight forwarders, requires "that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936."[4] We recognize the importance of the ocean freight forwarding industry to the American economy; without the industry's services, our vital export trade would be at a serious disadvantage in the intense competition of world commerce. It is equally important that the forwarding industry flourish at the lesser ports to insure maximum utilization of all shipping routes to our trading associates in all corners of the world. Rule 510.22 (a) is reasonable and necessary to prevent the New York forwarders from using their position of power to stifle forwarders at Boston, Philadelphia, Baltimore and Norfolk.

C. *Section 510.23(j)*

In substance, this rule requires a licensed forwarder to itemize or state separately in billing exporters the actual expenditures made on the shipper's behalf as well as the fees assessed for his own services. Traditionally, the invoices of New York forwarders showed as one item the total charge for accessorial services such as procuring insurance, warehousing or cartage. This charge included the forwarder's costs as well as his fee for arranging the service. The Maritime Commission believes that the proposed rule is necessary to prevent freight forwarders from using

[4] The 1936 Act declares, "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine . . . to provide shipping service on all routes essential for maintaining the flow of . . . domestic and foreign water-borne commerce at all times." 46 U. S. C. § 1101.

these billing methods to mark up insurance and accessorial charges indiscriminately.

The forwarders suggest that the rule will cause them to lose the gross profit customarily received in arranging for accessorial services, a loss they claim will seriously affect the profitability of their operations. They argue that the practice of including the disbursement and service fee as one item on the invoice to the shipper does not violate either Section 16 or Section 17 of the Shipping Act. Section 16 (First), 46 U. S. C. § 815, makes it unlawful for any forwarder to give an undue or unreasonable preference or advantage to one person or to subject a person to any undue or unreasonable prejudice or disadvantage. We agree with the Commission that substantial evidence before it indicated the traditional billing methods lead to discriminatory practices outlawed by Section 16 (First); we therefore find it unnecessary to consider whether Section 510.23 (j) is necessary to eliminate purported violations of Section 17.

It is true, as the New York Association argues, that there is no discrimination in the sense that some shippers are billed differently, for all bills treat the disbursement and service fee as one item. But this very method permits forwarders to discriminate in the amount of the *charges* levied against shippers. In its 1949 report the Maritime Commission noted:

> The most common abuses arise from the forwarders' methods of billing—the failure to specify clearly and state separately all service charges, and to segregate them from actual out-of-pocket costs for accessorial services * * * This practice is unjust and unreasonable. *Port of New York Freight Forwarder Investigation*, 3 U. S. M. C. 157, 163 (1949).

In 1961 the agency again concluded that markups "are imposed in a random fashion, vary from shipper to shipper

and from shipment to shipment, and appear to bear no relation to the cost to the forwarder for his services of placing the insurance." *Investigation of Practices, Operations, Actions, and Agreemnets of Ocean Freight Forwarders*, 6 F. M. B. 327, 340-41 (1961). The Maritime Commission properly relied on these earlier findings in drafting Section 510.23(j). The agency's rule-making process is not conducted in an isolated vacuum but is a continuing one; evidence gathered in the past, so long as it is still relevant, may be useful in exploring solutions to present problems.

The forwarders argue that a Section 16 (First) violation is shown only when (1) two shippers are given unequal treatment, (2) the shippers are competitors, and (3) the preference to one or disadvantage to the other is the proximate cause of an injury; these prerequisites, they urge, are not supported by the Commission's record. We hold, however, that the substantial evidence that forwarders, in random fashion, charge shippers disguised markups of widely varying amounts, for no apparent reason, suffices to establish discrimination in violation of Section 16 (First). In urging that all three prerequisites must be met, the forwarders rely upon cases involving alleged discrimination in transportation or wharfage charges. See, e.g., Agreement 8765-Gulf/Mediterranean Trade, 7 F. M. C. 495 (1963); Wharfage Charges and Practices at Boston, Mass., 2 U. S. M. C. 245 (1940). We find those cases not apposite. Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas, for example, bears no relation to the fees levied for heavy industrial equipment. To find an unlawful discrimination in transportation charges thus quite properly requires a showing of competitive relationship between two shippers who are charged different prices. But forwarders render substantially the same service to all shippers in procuring insurance or arranging for cartage; the commodity being shipped has little or nothing to do with

the reasonableness of the fee exacted for the forwarder's service. The very practice of charging shippers disguised markups of widely varying amounts on substantially identical services, without justification, seems to us to be prima facie discriminatory in a regulated industry. In any event, we do not believe competitive relationships must be shown to justify the prophylactic disclosure technique of Rule 510.23(j).

The New York Association argues that the proposed rule will not eliminate the supposed discrimination involved in assessing different charges for the same accessorial work. Requiring a forwarder to disclose his gross profit will not by itself, they urge, serve to prevent undue discrimination between similarly situated competitive shippers. But we cannot override the Commission's expert judgment that an informed shipping public will upon learning the factual details eliminate the discriminatory and unfair practices resulting from hidden charges for accessorial services. Our role as judges is limited to weighing the reasonableness of the experts' chosen means to eliminate a statutory violation.

Finally, the National Customs Brokers urge that the Commission should have adopted a more limited regulation requiring the forwarder to inform the shipper of the insured value, the insurance rate charged, and the fact that the forwarder may have charged the shipper for insurance at a rate over the forwarder's own cost. This proposed modification would not require the forwarder to disclose his premium cost when he has utilized his own open policy. But the seeming reasonableness of the Custom Brokers' proposal does not establish the unreasonableness of the Maritime Commission's regulation.

We therefore hold that the itemized billing requirement of Section 510.23(j) is reasonable and necessary to prevent discriminatory practices violative of Section 16 (First) of the Shipping Act.

D. *Section 510.24(e)*

A licensed forwarder is required by this rule to certify to the carrier on each shipment for which compensation is claimed that he has solicited and secured the cargo, or booked it or arranged its space, and has performed at least two of the additional services enumerated in Section 44(e). The specificity required by the rule is intended to eliminate "automatic" collection of brokerage payments and to permit the carrier to determine the value of the section 44 services actually rendered.

The New York Association prefers the present practice whereby a forwarder, to obtain compensation from a carrier, furnishes one invoice and one certificate covering all shipments a forwarder handles on a single vessel. The Association advocates a single, general certification which does not particularize the forwarder's services and may be used to cover an unlimited number of shipments. But the specific section 44 services performed by the forwarder will vary from shipment to shipment; a single, blanket certification for each voyage will reveal no more than a certification covering all shipments for a given month or even year. The Commission's proposed regulation is fully supported by Section 44(e)'s requirement that a forwarder certify that "he performed the above specified services *with respect to such shipment.*" (Emphasis added.)

Nor can we accept the Association's suggestion that the regulation will necessarily result in a "mountain of paper work." Only occasionally will additional documents be required—often the forwarder will be able to certify his claim on existing documents, such as a bill of lading.

Finally, the Association doubts that the check-off provisions will serve a useful regulatory purpose. It notes that if the Maritime Commission suspects that a certification is false, it will still be necessary to call upon the forwarder to demonstrate that the minimum services required by the statute have been performed. Of course, investigation will

still be required, but the very purpose of the proposed rule is to narrow the inquiry to whether the checked-off services were performed with respect to a particular shipment and to ease the difficulties in ascertaining a certification's conformity with the actual facts. A single or blanket certificate covering many shipments would make supervision difficult and invite evasion; we therefore hold that Section 510.24(e) represents a reasonable exercise of the Maritime Commission's enforcement authority.

E. *Section 510.24(g)*

This rule provides that no forwarder, or person owned or controlled by such forwarder, may collect brokerage from an ocean carrier unless it has performed the statutorily enumerated services. When the original version of the rule was amended to exclude brokerage commissions on bulk cargo, all petitioners withdrew their objections except Farrell Shipping Co., Inc. and Farrell Bros. Brokerage, Inc.

The rule seeks to avoid wholesale evasion of Section 44(e) of the Shipping Act. That section is intended to avoid the evil of commission payments by carriers to forwarders where the forwarder has performed little or no service in connection with a shipment. It therefore provides as we have already indicated, that a common carrier by water may compensate an ocean freight forwarder "when and only when" the freight forwarder certifies that he is licensed and "has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo," and at least two out of five additionally enumerated services. If licensed forwarders, or their alter egos, can collect brokerage commissions without certifying performance of the requisite number of services under section 44(e) simply by claiming they are acting as ocean freight brokers, sec-

tion 44(e) will stand devoid of meaning. Rule 510.24(g) is, therefore, necessary to prevent a freight forwarder's alter ego from claiming brokerage as a freight broker whenever the forwarder itself cannot complete a section 44(e) certificate because the requisite services have not been performed. The rule does not regulate independent brokers, who are concededly not subject to regulation, but only limits a licensee's affiliations in order to prevent circumvention of the 1961 Act's limitations on the receipt of brokerage payments. See *American Union Transport, Inc.* v. *United States*, 257 F. 2d 607, 612 (D. C. Cir. 1958), *cert. denied*, 358 U. S. 828 (1959).

The challenged regulation directly affects the Farrell operation. Farrell Shipping Co. was registered with the Maritime Commission as a freight forwarder before the enactment of the 1961 Law. After that law was passed, Farrell Bros. Brokerage was incorporated to engage primarily in export freight brokerage and chartering brokerage activities. The two companies have common owners and occupy adjacent office facilities. But even if we accept Farrell's contention that Farrell Brokerage never charges a carrier a brokerage fee on cargo for which Shipping has acted as a freight forwarder, Rule 510.24(g) must be upheld. Regulations are not directed at the practices of a single corporation, nor are they vitiated by the fact that in attempting to curtail illegal activity by some persons limitations are also placed on assumedly legitimate activities of others. Rule 510.24(g) represents a reasonable and necessary effort to prevent those freight forwarders who are unable to give the certificate required by section 44(e) from charging ocean common carriers for an incomplete forwarding service by calling it a brokerage service.

We do not overlook Farrell's contention that it would have been more reasonable to require a broker to furnish a written statement under oath specifying the brokerage services performed and attesting that the brokerage charge is

not made to avoid compliance with section 44(e). But we cannot reject the Commission's implicit determination that it would be too difficult, under such a rule, to regulate freight forwarders if their owners are permitted to operate separate businesses that charge for brokerage services. We, therefore, hold that Rule 510.24(g) is reasonable and necessary to insure that freight forwarders are compensated by ocean carriers only when the requisite section 44(e) services have been performed.

F. *Section 510.25(a)*

If this rule is upheld, forwarders will be required upon reasonable request, to disclose to Maritime Commission personnel or bona fide shippers *special contracts or arrangements* with shippers. The object is to assure nondiscriminatory treatment by freight forwarders to similarly situated shippers seeking "special contracts." We need not agree with the Commission that "the best way to assure nondiscriminatory treatment is to allow shippers to determine the rates at which freight forwarder services are being performed under special contracts for persons similarly situated." F. M. C. No. 973, Denial of Petitions for Reconsideration, p. 7. It is sufficient that we find the rule a reasonable vehicle for enforcing compliance with Section 16's prohibition against a forwarder "unduly or unreasonably preferring or discriminating against" any person.

We cannot accept the New York Association's argument that the regulation is unlawful because it requires disclosure of a confidential relationship and compels the forwarder to reveal information to a third party in violation of Section 20 of the Shipping Act, 46 U. S. C. § 819. Section 20 makes it unlawful for any forwarder to disclose without the consent of his shipper any information concerning the nature, quantity, destination, consignee or routing of any shipment which may be used to the shipper's detri-

ment or improperly disclose his business transactions to a competitor. Because the term "special contract," as defined in Section 510.21(j), is directed to the financial arrangements which may exist between forwarder and shipper, such as lump sum charges or monthly retainers, we cannot see how Section 510.25(a) will cause disclosure of the confidential business details mentioned in Section 20. Moreover, a forwarder's charges for his services can never be "confidential," given the public nature of his already carefully regulated calling. *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33 (1917).

Finally, we note that the challenged regulation merely replaces one that required forwarders to "advise" shippers of the terms under which they made "special contracts or agreements" available to other shippers. General Order 72, 15 Fed. Reg. 3153, §§ 244.9, 244.10 (1950). We are persuaded that this minor change is reasonable and necessary to effectuate the anti-discrimination provisions of the Shipping Act.

We conclude that the six challenged regulations are reasonable and necessary to implement the policy and objectives of the 1916 Shipping Act and the 1961 Freight Forwarder Law. The regulations are not in excess of the authority conferred by both statutes. We therefore affirm the Commission's order promulgating the regulations.

2. Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of October, one thousand nine hundred and sixty-four.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSN., INC., INGE AND CO., INC., BARR SHIPPING CO., INC., MAJOR FORWARDING CO., INC., and JOHN H. FAUNCE, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,
Respondents,

PHILADELPHIA FREIGHT BROKERS, FORWARDERS AND CUSTOM BROKERS and FORWARDERS ASSN., INC., BALTIMORE CUSTOMHOUSE BROKERS AND FORWARDERS ASSN., FOREIGN COMMERCE CLUB OF BOSTON, INC., and EXPORT AND IMPORT FORWARDING ASSOCIATION OF VIRGINIA,
Intervenors.

Petition for review of an order of the Federal Maritime Commission.

Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of the record from the Federal Maritime Commission and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of the Federal Maritime Commission be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

Opinion of Federal Maritime Commission Denying Petitions For Reconsideration in Docket No. 973

FEDERAL MARITIME COMMISSION

No. 973

PRACTICES OF LICENSED INDEPENDENT OCEAN FREIGHT, OCEAN FREIGHT BROKERS, AND OCEANGOING COMMON CARRIERS

DENIAL OF PETITIONS FOR RECONSIDERATION

By order dated April 2, 1963, the Commission adopted rules in this proceeding to become effective June 1, 1963. Petitions to reconsider certain of the adopted rules and to postpone the effective date of the rules pending reconsideration were filed on May 13, 1963, by the National Custom Brokers and Forwarders Association of America, Inc. (National Association), on May 20, 1963, by Farrell Shipping, Inc. and Farrell Bros. Brokerage, Inc. (Farrell), and on May 20, 1963, by the New York Foreign and Freight Forwarders Brokers Association, Inc. (New York Association). The petition of the National Association relates only to rule 510.23(j), the petition of Farrell relates only to rule 510.24(g) and the petition of the New York Association relates to rules 510.21(l), 510.22(a), 510.23(j), 510.24(g), 510.24(h), and 510.25.

The Commission hereby denies each of the motions because it has already considered the substance of the arguments presented in each of the petitions and believes the rules are based upon sound reasons. The reasons for adop-

tions of each of the rules to which the petitions are directed are stated below:

RULE 510.21(l).

The purpose of rule 510.21(l) is to define the term "beneficial interest" as used in the following section of Public Law 87-254:

> "An 'independent ocean freight forwarder' is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest."

We think it clear that the term "beneficial interest" as used in this statute includes persons who finance shipments. A predecessor bill (S. 1368, 87th Cong., 1st sess.) defined "an independent ocean freight forwarder" as "a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein other than a lien." A representative of the Federal Maritime Board testified as follows:

> "H. R. 2488 defines 'independent ocean freight forwarder' so as to exclude any person having a beneficial interest, other than a lien in a shipment being dispatched. A lien on a shipment could give a freight forwarder sufficient beneficial interest in the shipment to cause payments thereon by the carrier to the forwarder to be a form of indirect rebate of the freight. It is therefore recommended that the

> words 'other than a lien' be deleted from line 7 page 2 of the bill."[1]

The phrase "other than a lien" was deleted "in agreement with the Commerce Department's position that a lien on a shipment could give a freight forwarder sufficient beneficial interest in the shipment to cause payments thereon by the carrier to the forwarder to be a form of indirect rebate of the freight." (Senate Rept. No. 691, 87th Cong., 1st sess., page 4). We think this makes it clear that Congress intended that a lien interest should constitute a beneficial interest. Rule 510.21(l) specifies, in part,

> "that any obligation arising in favor of a licensee by reason of advances of out-of-pocket expenses incurred in dispatching of shipments shall not be deemed a beneficial interest."

We do not think that Congress intended that liens which might arise from payment of ocean freight monies should be deemed a beneficial interest because Public Law 87-254 expressly lists "payment of the ocean freight charges" as a function a freight forwarder may perform and a basis for his receipt of compensation. This is not so with respect to liens which arise from financing of the purchase of export shipments, which function is primarily that of the exporter or financial institutions and not of the independent ocean freight forwarder.

RULE 510.22(a).

The purpose of the portion of this rule to which the New York Association objects is to prevent forwarders in principal ports who may control cargo moving through out-

[1] Hearings before the Subcommittee on Merchant Marine and Fisheries, House of Representatives, on H. R. 2488, 87th Cong., 1st Sess., page 18.

ports, from bypassing forwarders in the outports. We think it important in the development and free flow of the foreign commerce of the United States that local freight forwarders be available at outports and that their existence will be endangered if the carrier or its agent performs services at the outport for a forwarder not located there.[2] The New York Association is concerned that under this rule a forwarder who merely "requests" a carrier to perform forwarding services may be denied compensation even though the services is not, in fact, rendered by the carrier. This is not the intention of the rule and it will not be interpreted to require that a carrier deny compensation where a forwarder requests but the carrier does not render the services requested.

RULE 510.23(j).

The purpose of this rule is to prevent freight forwarders from indiscriminately marking up insurance and accessorial services. As indicated in the Examiner's Report in Dockets No. 765/831,

> "These markups, so far as the record discloses, are imposed in a random fashion, varying from shipper to shipper and from shipment to shipment, and appear to bear no relation to the cost to the forwarder for his services of placing the insurance, despite the testimony of some forwarders that the markups represent legitimate service charges covering the work necessary to secure insurance coverage, preparation of insurance certificates, and handling of claims where necessary." (Recommended Decision in Dockets No. 765/831, pages 16-18).[3]

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[2] See Board Report in Dockets No. 765/831, pages 19-20; Examiner's Report in that Docket, pages 20-21; and Hearings on H. R. 2488, *supra*, page 56.

[3] A similar finding is made in the Report of the Federal Maritime Board in Dockets No. 765/831, pages 15-17.

The New York Forwarders claim:

> "it is our understanding that this rule requires a forwarder to state separately on his invoice to the shipper the premium cost and his service fee for arranging insurance. However, the rule is far from clear as to what the obligations of the forwarder are with respect to other accessorial services rendered, such as cartage, warehousing and recoopering.'"

The rule specifically states that "premium cost of insurance arranged" must be shown and also states that "all other charges or fees assessed by the licensee for *arranging* the services enumerated in subparagraphs (1), (2), (3), and (4) of this paragraph shall be itemized." The intent is that where a freight forwarder is the middle man who merely arranges to have the service (other than insurance) performed by another party, the charge by the freight forwarder for arranging such service shall be invoiced. Where, however, the freight forwarder provides the service to the shipper, for example, where he hires a truck to carry the freight of various shippers to the ship and charges each one a specific amount, only the charge he makes to the shipper for the cartage service (not an allocation of the freight forwarder's cost of providing the service) need be shown.

RULE 510.24(g).

The purpose of this rule is to avoid wholesale evasion of Sections 44(a) and (e) of the Shipping Act, 1916, as amended by Public Law 87-254. Section 44(e) states that a common carrier by water may compensate an ocean freight forwarder "when and only when" the freight forwarder certifies that he is licensed and

> "* * * has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for

space for, such cargo, and at least two of the following services:

"(1) The coordination of the movement of the cargo to shipside;

"(2) The preparation and processing of the ocean bill of lading;

"(3) The preparation and processing of dock receipts or delivery orders;

"(4) The preparation and processing of consular documents or export declarations;

"(5) The payment of the ocean freight charges on such shipments: * * * "

Allowing ocean freight forwarders, either directly or through the device of a separate corporation, to claim brokerage in cases where they cannot make such a certification would destroy the effectiveness of this statutory provision. In effect, rule 510.24(g) is a necessary complement to Section 44(e) of the Shipping Act. Moreover, Section 44(a) of the Shipping Act 1916 states in part:

"No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license * * * "

This provision, which is the crux of the P. L. 87-254, clearly conveys the intent of Congress and the standard by which the Commission can regulate the forwarding industry. Congress concluded that the forwarding industry must be fully regulated, for not only the good of the public, but for the good of the industry as well. To adopt the philosophy that a licensed freight forwarder can carry on an unregulated business very closely related to forwarding, viz., a brokerage operation, would render the statute ineffectual. Such an operation could easily be used to defeat the very purposes Congress sought to achieve.

RULE 510.24(h).

The purpose of this rule is to prohibit payments by the vessel to both the cargo broker and the freight forwarder on the same shipment. One of the requirements under rule 44(e) for payment or collection of compensation is that the freight forwarder "has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for such cargo * * *" These are basically the functions for which a broker is paid. If a vessel compensates both a freight forwarder and a broker on the same shipment, it is burdening ocean commerce with dual payments. Congress intended to prevent this as made clear in Senate Report No. 691, 87th Cong., 1st sess. The first page of the Senate Report indicates that a predecessor bill had been amended by adding the following language to the provision that was to become Section 44(e):

> "*Provided, however,* That where a common carrier by water has paid, or has incurred an obligation to pay, separate compensation to an independent ocean freight forwarder for any of the services enumerated above, such carrier shall not be obligated to pay additional compensation to any other independent ocean freight forwarder for services rendered on the same shipment."

The amendment is explained at page 3 of the Senate Report as follows:

> "A proviso added to this section would *prevent* payment of compensation to more than one forwarder on any shipment." (emphasis added.)[4]

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[4] See also page 5 of the same report which states:

"A proviso was added to the bill, to meet General Accounting Office's objection that otherwise a double charge, for both forwarding and brokerage, might be possible."

RULE 510.25.

The purpose of this rule is to assure nondiscriminatory treatment by freight forwarders to similarly situated shippers seeking "special contracts." The best way to assure nondiscriminatory treatment is to allow shippers to determine the rates at which freight forwarder services are being performed under special contracts for persons similarly situated.

IT IS ORDERED, That the petitions for reconsideration are hereby denied.

By the Commission, May 21, 1963.

THOMAS LISI,
Thomas Lisi,
Secretary.

(SEAL)

APPENDIX C

1. Pertinent Provisions of the Shipping Act (46 U. S. C. § 801 et seq.)

Sec. 16. That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *

Sec. 20. That it shall be unlawful for any common carrier or person, or for any other person authorized by officer, receiver, trustee, lessee, agent, or employee of such carrier or person, or for any other person authorized by such carrier or person to receive information, knowingly to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier or other person subject to this act for transportation in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used * * *

2. Public Law 87-254, enacted September 19, 1961

AN ACT

To amend the Shipping Act, 1916, to provide for licensing independent ocean freight forwarders, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of the Shipping Act, 1916 (46 U. S. C. 801), is amended by adding at the end thereof the following new paragraphs:

"The term 'carrying on the business of forwarding' means the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipments.

"An 'independent ocean freight forwarder' is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest."

SEC. 2. The Shipping Act, 1916, is further amended by redesignating section 44 as section 45, and inserting immediately after section 43 the following new section:

"SEC. 44. (a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business: *Provided, however,* That a person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license.

"(b) A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be an independent ocean freight forwarder as defined in this Act and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied. Any independent ocean freight forwarder who, on the effective date of this Act, is carrying on the business of forwarding under a registration number issued by the Commission may continue such business for a period of one hundred and twenty days thereafter without a license, and if application for such license is made within such period, such forwarder may, under such regulations as the Commission shall prescribe, continue such business until otherwise ordered by the Commission.

"(c) The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders and no such license shall be issued or remain in force unless such forwarder shall have furnished a bond or other security approved by the Commission in such form and amount as in the opinion of the Commission will insure financial responsibility and the supply of the services in accordance with contracts, agreements, or arrangements therefor.

"(d) Licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such license may, upon application of the holder thereof in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended or revoked

for willful failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

"(e) A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when, and only when, such person is licensed hereunder and has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at least two of the following services;

"(1) The coordination of the movement of the cargo to shipside;

"(2) The preparation and processing of the ocean bill of lading;

"(3) The preparation and processing of dock receipts or delivery orders;

"(4) The preparation and processing of consular documents or export declarations;

"(5) The payment of the ocean freight charges on such shipments:

Provided, however, That where a common carrier by water has paid, or has incurred an obligation to pay, either to an ocean freight broker or freight forwarder, separate compensation for the solicitation or securing of cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, then such carrier shall not be obligated to pay additional compensation for any other forwarding services rendered on the same cargo. Before any such compensation is paid to or received by any person carrying on the business of forwarding, such person shall, if he

is qualified under the provisions of this paragraph to receive such compensation, certify in writing to the common carrier by water by which the shipment was dispatched that he is licensed by the Federal Maritime Commission as an independent ocean freight forwarder and that he performed the above specified services with respect to such shipment. Such carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect."

APPENDIX D

Pertinent Provisions of General Order 4, Amdt. 1, Subpart B

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER 2—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[General Order 4, Amdt. 1]

PART 510—PRACTICES OF LICENSED INDEPENDENT OCEAN FREIGHT FORWARDERS, OCEAN FREIGHT BROKERS, AND OCEANGOING COMMON CARRIERS

Subpart B—Duties and Obligations

On February 24, 1962, the Commission caused to be published in the FEDERAL REGISTER (27 F.R. 1775-1776) a notice of rule making including certain proposed rules designated General Order 4, Amendment 1 (46 CFR Part 510) and invited comments thereon. After consideration of the comments received in response to that notice the Commission revised certain of the proposed rules, republished the revised proposed rules in the FEDERAL REGISTER January 3, 1963 (28 F.R. 911), and heard oral arguments on the proposed rules as revised.

The Commission has carefully considered the comments submitted and arguments on the proposed revised rules and has, pursuant to the authority of sections 43 and 44 of the Shipping Act, 1916 (75 Stat. §§ 522, 523, 766), adopted the rules hereinafter set forth.

The rules are promulgated to implement Public Law 87-254, approved September 19, 1961, and have for their purpose the establishment of standards and criteria to be observed and maintained by licensed independent ocean

freight forwarders, ocean freight brokers and oceangoing common carriers in the conduct of their business affairs.

Part 510 is hereby amended by the addition of a new subpart to Chapter IV of this title reading as follows:

Sec.

510.20 Scope
510.21 Definitions
510.22 Oceangoing common carriers and persons shipping for own account.
510.23 Duties and obligations of licensees.
510.24 Compensation and freight forwarder certifications.
510.25 Special contracts.
510.26 Section 15 agreements.
510.27 Separability.

AUTHORITY: § 510.20 to 510.27 issued under secs. 43, 44, Shipping Act, 1916 (75 Stat. 522, 523, 766); sec. 204, Merchant Marine Act, 1936 (49 Stat. 1987, as amended; 46 U. S. C. 1114).

§ 510.20 *Scope.*

This subpart pertains to the practices of licensed independent ocean freight forwarders, ocean freight brokers and oceangoing common carriers pursuant to Public Law 87-254.

§ 510.21 *Definitions.*

(a) The term "licensee" means any person licensed by the Commission as an independent ocean freight forwarder, or any independent ocean freight forwarder who, on September 19, 1961, was carrying on the business of freight forwarding under a valid registration number issued by the Commission, or its predecessors, who filed an application for such a license (Form FMC-18) on or before January 17, 1962, and whose application has not been denied.

Pertinent Provisions of General Order 4, Amdt. 1, Subpart B

(b) The term "in commerce from the United States" means export commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions or between such Territories and possessions.

(c) The term "oceangoing common carrier" as used in the rules in this subpart means a common carrier engaged in transportation by water of property in commerce from the United States, as defined in paragraph (b) of this section.

(d) The term "non-vessel operating common carrier by water" means a person who holds himself out by the establishment and maintenance of tariffs, by advertisement, solicitation, or otherwise, to provide transportation for hire by water in interstate commerce as defined in the Act, and in commerce from the United States as defined in paragraph (b) of this section; assumes responsibility or has liability imposed by law for safe transportation of shipments; and arranges in his own name with underlying water carriers for the performance of such transportation whether or not owning or controlling the means by which such transportation is effected.

(e) The term "principal" means the shipper, consignee, seller, purchaser who employs the services of a licensee.

(f) The term "ocean freight broker" means any person who is engaged by a carrier to sell or offer for sale transportation, and who holds himself out by solicitation or advertisement as one who negotiates between shipper and carrier for the purchase, sale, conditions and terms of transportation.

(g) The term "freight forwarding fee" means payment by a shipper, consignee, seller, purchaser, or any agent thereof, to a licensee for the performance of a freight forwarding service as defined in § 510.2(c).

Pertinent Provisions of General Order 4, Amdt. 1, Subpart B

(h) The term "compensation" means payment by an oceangoing common carrier for the performance of services as specified in § 510.24(e).

(i) The term "brokerage" means payment by a common carrier by water to an ocean freight broker for the performance of functions specified in paragraph (f) of this section.

(j) The term "special contract" means lump sum forwarding charges, monthly retainer fees, or similar financial arrangements that may exist between a principal and a licensee.

(k) The term "Act" means the Shipping Act, 1916 (46 U. S. C. 801 et seq.).

(l) The term "Beneficial interest" for the purpose of these rules includes, but is not limited to, any lien interest in; right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from; the whole or any part of a shipment or cargo, arising by financing of the shipment or by operation of law or by agreement, express or implied, provided, however, that any obligation arising in favor of a licensee by reason of advances of out-of-pocket expenses incurred in dispatching of shipments shall not be deemed a beneficial interest.

(m) The term "reduced forwarding fees" as used herein means charges to a principal for forwarding services that are below the licensee's usual charges.

§ 510.22 *Oceangoing common carriers and persons shipping for own account.*

(a) An oceangoing common carrier, or agent thereof, meeting the requirements of section 44 and these rules, may be licensed. An oceangoing common carrier may perform freight forwarding services without a license only

with respect to cargo carried under its own bill of lading, in which case charges for such forwarding services shall be assessed in accordance with published tariffs on file with the Commission. No licensee may charge or collect compensation in the event he requests the carrier or its agent to perform any of the forwarding services set forth in § 510.2(c) unless no other licensee is willing and able to perform such services.

* * *

§ 510.23 *Duties and obligations of licensees.*

* * *

(j) Every licensee shall use invoices or other forms of billing which state separately as to each shipment: (1) The actual amount of ocean freight assessed by the ocean-going common carrier; (2) the actual amount of consular fees paid; (3) the insured value, insurance rate, and premium cost of insurance arranged; (4) the charge for each accessorial service performed in connection with the shipment. All other charges or fees assessed by the licensee for arranging the services enumerated in subparagraphs (1), (2), (3) and (4) of this paragraph shall be itemized. Licensees shall not be required to itemize the components of charges with respect to transactions made pursuant to § 510.25: *Provided, however,* That licensees who offer to the public at large to forward small shipments for uniform charges available to all and duly filed with the Federal Maritime Commission, shall not be required to itemize the components of such uniform charges on shipments as to which the charges shall have been stated to the shipper at time of shipment, and accepted by the shipper by payment; but if such licensees procure Marine Insurance to cover such shipments, they must state their total charge for such insurance, inclusive of premiums and placing fees, separately from the aforementioned uniform charge.

* * *

Pertinent Provisions of General Order 4, Amdt. 1, Subpart B

§ 510.25 *Special contracts.*

(a) Every licensee shall retain in its files a true copy, or, if oral, a true and complete memorandum of every special arrangement or contract with its principal, or modification or cancellation thereof, to which it may be a party or conform in whole or in part. Authorized Commission personnel and bona fide shippers shall have access to such contracts upon reasonable request.

* * *

§ 510.27 *Separability.*

The provisions of these rules are not interdependent. If any portion hereof shall be enjoined, set aside, suspended, or held invalid, the validity and enforceability of all other rules shall be unaffected thereby, and shall to the full extent practicable, remain in full force and effect unless and until it is otherwise provided by the Commission or a court of competent jurisdiction.

These rules shall become effective June 1, 1963.

By order of the Federal Maritime Commission, April 2, 1963.

THOMAS LISI,
Secretary.

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Nos. 752 and 887

In the Supreme Court of the United States

OCTOBER TERM, 1964

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC., PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 752

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION

No. 837

NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC., PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. No. 752, pp. 19–43; Pet. No. 837, pp. 1a–25a) is reported at 337 F. 2d 289. The opinion of the Federal Maritime

Commission (Pet. No. 752, pp. 46–53; Pet. No. 837, pp. 1d–8d) is reported at 2 S.R.R. 735.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1964, and rehearing was denied *en banc* on November 12, 1964 (Pet. No. 837, pp. 1b–2b, 1c–2c). The petitions for writs of certiorari were filed on December 11, 1964 (No. 752), and January 15, 1965 (No. 837), respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether rules promulgated by the Federal Maritime Commission regulating freight forwarders were within the rulemaking authority of the Federal Maritime Commission.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Shipping Act of 1916, as amended by the Freight Forwarder Law of 1961, 75 Stat. 522, 46 U.S.C. 801, *et seq.*, and the Federal Maritime Commission's General Order 4, Amendment 1, Subpart B, are set out in the petition in No. 752, pp. 54–64.

STATEMENT

Petitioners challenge certain rules issued by the Federal Maritime Commission to implement the national maritime policy, particularly the Freight Forwarder Law of 1961, 75 Stat. 522, which required that independent ocean freight forwarders be licensed and allowed them to receive "brokerage" payments in spe-

cified circumstances. The disputed regulations—General Order 4, Amendment 1, Subpart B (28 Fed. Reg. 4300; 29 Fed. Reg. 5559; 46 C.F.R. 510.20 to 510.27)—were issued pursuant to a general rulemaking proceeding participated in by petitioners and others (FMC Docket 973). The rules provide that a freight forwarder (1) will not be deemed "independent" if it has any "[b]eneficial interest" in a shipment (Section 510.21 (*l*)); (2) cannot collect compensation from a carrier when the carrier itself performs part of the forwarding services (Section 510.22(a)); (3) must itemize on its bill all expenses incurred on the shipper's behalf as well as the forwarder's charges (Section 510.23(j)); and (4) must disclose, upon request, to the Commission or any *bona fide* shipper any special contracts or arrangements it has with other shippers (Section 510.25(a)).[1]

After the Commission had denied petitions for reconsideration of the above regulations, separate petitions for review were filed in the Courts of Appeals for the Second Circuit and the District of Columbia Circuit. All of the cases were consolidated for argument before the Second Circuit under 28 U.S.C. 2112(a). On October 14, 1964, that court affirmed

[1] Petitioners in No. 752 argue that all four regulations are invalid. The petitioner in No. 837 contends only that Section 510.23(j) should be set aside insofar as it requires disclosure of fees charged and premiums paid by a forwarder for insurance.

Sections 510.24 (e) and (g) were also challenged in the court of appeals, but those claims apparently are not being pressed in this Court (but see Pet. No. 752, p. 7, note 3).

the Commission's order (Pet. No. 752, p. 43):

> [T]he six challenged regulations are reasonable and necessary to implement the policy and objectives of the 1916 Shipping Act and the 1961 Freight Forwarder Law. The regulations are not in excess of the authority conferred by both statutes.

ARGUMENT

1. Ocean freight forwarders are employed by shippers or consignees to dispatch their shipments and perform other incidental services. For example, forwarders customarily secure cargo space, prepare shipping documents, and make insurance arrangements (Pet. No. 752, p. 22). While these functions have been generally recognized as valuable, certain activities of the forwarding industry have been investigated and found objectionable. Among the more significant abuses were (1) the so-called "brokerage" payments which the forwarders had, for many years, more-or-less automatically received from ocean carriers regardless of whether such payments were warranted, and (2) the methods employed by forwarders to bill charges to their shipper clients. See, *e.g.*, *Port of New York Freight Forwarder Investigation*, 3 U.S.M.C. 157; *Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders and Related Matters*, 6 F.M.B. 327; *United States* v. *American Union Transport, Inc.*, 327 U.S. 437. See also H. Rep. No. 2939, 84th Cong., 2d Sess., pp. 8, 14, 35; H. Rep. No. 2333, 85th Cong., 2d Sess., p. 13; S. Rep. No. 691, 87th Cong., 1st Sess., pp. 9, 10, 13, 19; H. Rep. No. 1096, 87th Cong., 1st Sess., p. 20.

In the *Port of New York Freight Forwarder Investigation,* 3 U.S.M.C. 157, the Commission found that forwarders had been concealing in their billings markups of varying degrees over and above out-of-pocket expenses incurred for accessorial services such as insurance. In addition, the investigation revealed that many shippers had been collecting "brokerage" from carriers by holding themselves out as forwarders, and that forwarders who had beneficial interests in shipments had been accepting brokerage fees on them. *Id.* at 163–164. The latter practices amounted to rebates in violation of Section 16 of the Shipping Act of 1916, 46 U.S.C. 815, and the Commission's predecessor, the Federal Maritime Board, in 1950 issued regulations, substantially identical to the ones challenged here, to correct the situation. General Order 72, 15 Fed Reg. 3153; *Port of New York Freight Forwarder Investigation, supra,* 3 U.S.M.C. at 165.

Later, the Board, after further investigation, found a continuation of the same abuses and concluded that the 1950 regulations had been "ineffective in preventing rebates." *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders and Related Matters,* 6 F.M.B. 327, 349–351. It therefore revised and strengthened the regulations generally and, in addition, placed an absolute prohibition on the payment of "brokerage" to forwarders by carriers. *Id.* at 368.

As a result of the Board's total prohibition against brokerage payments from carriers to forwarders, Congress was urged by the forwarders to enact miti-

gating legislation. As a result, Congress passed the Freight Forwarder Law of 1961 which allowed the payment of such brokerage compensation under certain conditions—*e.g.*, when a licensed forwarder actually booked ship space for the cargo, prepared the bill of lading, and paid freight charges (Pet. No. 752, p. 57)—and authorized the Commission to "prescribe reasonable rules and regulations" (Pet. No. 752, p. 56). In favorably reporting the bill which was later passed, the Senate Commerce Committee stated (S. Rep. No. 691, 87th Cong., 1st Sess., p. 7):

> We recognize that malpractices have been widespread in the past, but we are confident that the regulatory authority given the Board in this bill will prevent such practices in the future, and we, therefore, have no hesitancy in recommending that the bill as amended be approved.

Upon passage of the Freight Forwarder Law of 1961, the Commission necessarily revoked the Board's prior regulations and began a new rulemaking proceeding which resulted in the regulations here challenged. In formulating those regulations, the Commission took into account the statutory objectives, the history of the industry's problems, and numerous comments received from interested parties (see Pet. No. 752, pp. 46–53).

2. The petitions present no substantial question warranting further review by this Court. There is no conflict between circuits, and the decision below—which is based on an exhaustive and careful opinion—is correct.

Petitioners' basic contention (Pet. No. 752, pp. 5-6; Pet. No. 837, p. 12) is that all of the regulations are

invalid because "the Commission's rulemaking authority is limited to correcting practices found to violate * * * the 1916 Shipping Act." This argument, as the court of appeals held, takes a too "restrictive view of the agency's powers" (Pet. No. 752, p. 28). Congress specifically gave the Commission authority in Section 2 of the Freight Forwarding Law of 1961, 46 U.S.C. 841b(c), to "prescribe reasonable rules and regulations" without any such restriction. Moreover, a similar contention was rejected by the Court in *American Trucking Assns.* v. *United States*, 344 U.S. 298, 309–310, when it held that it was the "very absence" of Congressional "consideration of every evil sought to be corrected" which made necessary administrative rules to fill in the interstices. Similarly, this Court held in *California* v. *United States*, 320 U.S. 577, 584, that "[f]inding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing."[2]

It is well established that regulations promulgated by administrative agencies, under general rule-making

[2] In *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, on which petitioners rely, the Court held that the Commission's interpretation of the statute it was seeking to enforce was plainly incorrect and therefore its regulations based on that interpretation were invalid. The Court, however, did not suggest, as petitioners imply, that the Commission could not implement the statute by regulating conduct based on a correct interpretation, notwithstanding that the conduct was not specifically barred by the statute. Indeed, the Court suggested the contrary. 347 U.S. at 289, note 7.

authority conferred by Congress, are valid unless they are unreasonable or plainly inconsistent with the statute. See, *e.g.*, *United States* v. *Morehead*, 243 U.S. 607, 614; *United States* v. *Smull*, 236 U.S. 405, 410–411; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203; *United States* v. *Obermeier*, 186 F. 2d 243, 247 (C.A. 2), certiorari denied, 340 U.S. 951; *American Union Transport, Inc.* v. *United States*, 257 F. 2d 607, 612 (C.A. D.C.), certiorari denied, 358 U.S. 828; *Grace Line, Inc.* v. *Federal Maritime Board*, 263 F. 2d 709, 711 (C.A. 2). We show below that each of the four rules challenged in this Court are reasonable and necessary to implement the shipping laws.

a. Rule 519.21(l).—The Freight Forwarder Law of 1961 provides that forwarders must be licensed and that licenses can only be issued to "independent" operators—those having no "beneficial interest" in the shipments they are forwarding (Pet. No. 752, pp. 55–56). This regulation defines the term "beneficial interest" to include "any lien interest" except those arising from payment by the forwarder of out-of-pocket expenses on behalf of the shipper (Pet. No. 752, p. 62). Petitioners in No. 752 object (Pet. 9) to the rule because, in their view, it unreasonably "bar[s] a forwarder from advancing the invoice price of a shipment even though the practice is not *per se* unlawful."

The short answer is that the Commission's rule fully accords with the intent of Congress, as expressed in the Freight Forwarder Law. Legislation proposed by the forwarding industry defined an independent forwarder as one having any "beneficial interest other

than a lien" in a shipment. H. Rep. No. 1096, 87th Cong., 1st Sess., p. 8. But Congress deleted the phrase "other than a lien" from the statute on the ground that "a lien on a shipment could give a freight forwarder sufficient beneficial interest in the shipment to cause payments thereon by the carrier to the forwarder to be a form of indirect rebate of the freight." S. Rep. No. 691, 87th Cong., 1st Sess., p. 4. Similarly, as noted above, a principle purpose of the restrictions on forwarders was to prevent rebates to shippers. The rule is reasonably calculated to prevent forwarders, who in reality own goods in the guise of financing, to use this subterfuge to obtain a discounted freight rate.

b. Rule 510.22(a).—This rule provides that a forwarder cannot collect compensation if, at the forwarder's request, any of the forwarder's services are performed by the carrier or its agent (Pet. No. 752, pp. 62–63). The purpose of the regulation, as expressed by the Commission, was to "prevent forwarders in principal ports who may control cargo moving through outports, from bypassing forwarders in the outports," as had been done by New York forwarders to the detriment of forwarders at other Atlantic ports (Pet. No. 752, pp. 48–49). See *Investigation of Practices, supra,* 6 F.M.B. at 345.

The Freight Forwarding Law specifically provides that the licensing of freight forwarders must be "consistent with the national maritime policies declared in the Merchant Marine Act * * *." 46 U.S.C. 841b(b). That Act in turn provides that it is "the policy of the United States to foster the develop-

ment and encourage the maintenance of * * * a merchant marine." 46 U.S.C. 1101. As the court of appeals held (Pet. No. 752, p. 35):

> We recognize the importance of the ocean freight forwarding industry to the American economy; without the industry's services, our vital export trade would be at a serious disadvantage in the intense competition of world commerce. It is equally important that the forwarding industry flourish at the lesser ports to insure maximum utilization of all shipping routes to our trading associates in all corners of the world.

c. Rule 510.23(j).—This rule requires that forwarders, on their billing forms, itemize their charges and list the actual cost of, among other things, insurance premiums (Pet. No. 752, p. 63). The practice of forwarders had been to bill shippers for the total amount due under one item, covering charges for all services as well as their own actual expenditures on behalf of the shippers. The Commission promulgated the regulation to "prevent freight forwarders from indiscriminately marking up insurance and accessorial services" (Pet. No. 752, p. 49). Since discrimination in charges between shippers for the same service could amount to an unreasonable preference or advantage in violation of Section 16 (First) of the Shipping Act of 1916, 46 U.S.C. 815, this rule is plainly reasonable to prevent this evil.

Petitioners argue (Pet. No. 837, p. 5; see Pet. No. 752, pp. 12–16) that the rule is invalid because, while the Commission "determined that certain forwarders

charged different insurance markups to different shippers," "there was no finding that these shippers were similarly situated" and "that without such a finding, Section 16 First cannot be violated." But, as we have pointed out above (p. 7), the finding of a statutory violation is not a necessary prerequisite to the promulgation of rules.[3] In view of the forwarders' practice of imposing fees for the same service "varying from shipper to shipper and from shipment to shipment" (Pet. No. 752, p. 49), the Commission could properly require disclosure of costs—thus attempting to eliminate unreasonable preferences by bringing the practice to the attention of the shipping public rather than by attacking the practice on a case-by-case basis.

d. Rule 510.25(a).—This regulation requires disclosure to the Commission or to other shippers of any "special arrangement or contract" made with shippers (Pet. No. 752, p. 64). The present regulation is similar to a previous rule which required forwarders to "advise" shippers of the terms of special contracts or agreements made available to other shippers. General Order 72, Section 244.10, 15 Fed. Reg. 3153.

---

[3] The court of appeals stated that the "practice of charging shippers disguised markups of widely varying amounts on substantially identically services, without justification, seems to us to be prima facie discriminatory in a regulated industry" (Pet. No. 752, p. 38). Petitioners vigorously argue (Pet. No. 837, pp. 4–9; Pet. No. 752, pp. 12–16) that the Commission erred in finding that the Shipping Act had been violated. This issue, however, need not be reached in this case, since, as the court of appeals further noted (Pet. No. 752, p. 38), the rule is fully justified as a prophylactic measure.

Petitioners in No. 752 argue (Pet. 16) that the present rule requires disclosure of confidential information in violation of Section 20 of the Shipping Act of 1916, 46 U.S.C. 819. Here, as with the immediately preceding rule, the court of appeals correctly found that the established procedure was a "reasonable vehicle for enforcing compliance with Section 16's prohibition against a forwarder 'unduly or unreasonably preferring or discriminating against' any person" (Pet. No. 752, p. 42). The rule does not violate Section 20 which prohibits any forwarder from disclosing "any information concerning the nature, kind, quantity, destination, consignee or routing" of any shipment which may be used to the shipper's detriment or disclose his business transactions to a competitor. The Commission's rule is not directed to any of the information protected by Section 20 since the Commission has defined "special contract" as limited to financial arrangements. 46 C.F.R. 510.21(j) (Pet. No. 752, p. 62).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 752

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC., INGE AND COMPANY, INC., BARR SHIPPING COMPANY, INC., MAJOR FORWARDING COMPANY, INC. and JOHN H. FAUNCE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

REPLY BY PETITIONERS

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NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC., INGE AND COMPANY, INC., BARR SHIPPING COMPANY, INC., MAJOR FORWARDING COMPANY, INC. and JOHN H. FAUNCE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

REPLY BY PETITIONERS

This reply to respondents' brief is submitted on behalf of petitioners pursuant to Rule 24(4) of this Court.

Argument

Under their Point 2 respondents maintain that the Commission may prescribe reasonable rules and regulations under 46 U. S. C. 811b(c) governing the conduct of forwarders, even though there has been no agency finding of a statutory violation (Resp. Br., pp. 7, 11). This contention is squarely at variance with the legislative history of the act and pronouncements of this Court.

As respondents note in their brief (Resp. Br., p. 6) the regulatory authority given to the Commission in the Freight Forwarder Law of 1961 was to prevent "malpractices"

(S. Rept. No. 691, 87th Cong., 1st Sess., p. 7). The grant of such authority was in accord with the view of this Court in *California* v. *U. S.* 320 U. S. 577 to the effect that if the agency "found disobedience of the law" (p. 583) it could then define the outer bounds of permissible conduct.

Despite the clear Congressional expression that the authority given was to prevent "malpractices" and in the face of this Court's mandate that the Commission was preliminarily required to find a "wrong" or "disobedience of the law", respondents assert that the challenged rules may be upheld if they are "reasonable and necessary to implement the shipping laws" (Resp. Br., p. 8).

The assertion of such rulemaking power is ultra vires. While an agency may issue rules to fill in the interstices of the statute, nevertheless, the agency's administrative powers to do so are "limited by the scope of the statute." *Texaco, Inc.* v. *F. P. C.*, 317 F. 2d 796, 806. Respondents reject such limitation, insisting in effect that the Commission may adopt any rule whatsoever governing the conduct of forwarders, so long as it meets the vague standard of being "reasonable and necessary to implement the shipping laws." But it is not enought that the rules are reasonable and implementative. They must be "limited to filling in details within the framework of the statute." Otherwise, the agency is not making rules; it is legislating. *American President Lines, Inc.* v. *Mackey, et al.*, 120 F. Supp. 897, 899. Unless the decision below is reversed, under the broad "implementative" rule making power respondents assert herein, the agency will be a super Congress with unlimited power to legislate without regard to the statute.

American Trucking Assns. v. *U. S.*, 344 U. S. 298, relied upon by respondents (p. 7) is not contrary to the position of petitioners herein. Even though the practice of "trip-leasing" was not specifically prohibited by the statute this Court noted that the rule was intended to ban practices

that lead to violations of the statute's provisions and that "practically the entire regulatory scheme is affected by trip-leasing" (pp. 311-312).

a. *Rule 510.21(1).* To support the rule banning the financing of a shipment by a forwarder, respondents point to a statement in the Senate report to the effect that "a lien on a shipment could give a freight forwarder sufficient beneficial interest in the shipment to cause payments thereon by the carrier to the forwarder to be a form of indirect rebate of the freight." Based on this cryptic statement, respondents maintain that "any lien interest" in a forwarder from financing is automatically a "beneficial interest", thus barring the licensing of a forwarder who has for generations provided a useful way of expediting our foreign sales by advancing the purchase price.

Respondents read too much into the legislative history. The Senate Committee did not say that every lien was a beneficial interest. It said that a lien "could" give a freight forwarder such interest. Obviously, the Committee had in mind the possibility that upon the exercise of a lien, a forwarder could obtain an equity interest in the goods so that a brokerage payment by a carrier might be a rebate. But if a forwarder does not foreclose on his lien for advancing freight, obviously the possibility of rebate is nonexistent.

What the Commission has done is erroneously and without foundation assumed that every lien for advancing the purchase price gives rise *ipso facto* to an equity in the goods, while at the same time excluding in the rule a lien for advancing out of pocket disbursements, such as the ocean freight. If Congress intended to ban all liens, there is no basis for the exclusion of a lien for disbursements. On the other hand, if Congress did not so intend, it is unreasonable and arbitrary to ban a lien for financing a shipment without a scintilla of evidence to support the proposition that

the lien alone will result in a beneficial interest in the licensee.

Petitioners do not disagree with what respondents state as the rule's purpose, that is, "to prevent forwarders, who in reality own goods in the guise of financing, to use this subterfuge to obtain a discounted freight rate" (Resp. Br., p. 9). The difficulty is that the rule goes too far; it also bars financing by forwarders who do not engage in the activity to obtain rebates, but rather to accommodate their overseas purchasers by making funds immediately available to pay the American supplier.

b. *Rule 510.22(a).*—Respondents seek to justify this rule, which denies compensation authorized by law, on the theory that it prevents forwarders in one port controlling cargo from bypassing forwarders in an outport by using a carrier to render a forwarding service (Resp. Br., p. 9).

Respondents do not claim that the use of a carrier in an outport is unlawful under the statute, as indeed it is not. Instead they point to a requirement in the Freight Forwarder Law (§ 44(b)) to the effect that in the issuance of a license the Commission must find that the proposed forwarding business is or will be consistent with the Merchant Marine Act, 1936.

The short answer is that a finding of consistency with the 1936 Act is required in the *issuance of a license* to a forwarder, not in his conduct subsequent thereto. The agency policy determination to penalize a forwarder by depriving him of earned revenue if he employs a carrier in the outport has no basis in the statute and is a "legislative act," hence unlawful. *International Brotherhood of Teamsters, etc.* v. *N.L.R.B.*, 365 U. S. 667, 674.

c. *Rule 510.23(j)*—While asserting that "the finding of a statutory violation is not a necessary prerequisite to the promulgation of rules" (Resp. Br., p. 11), respondents nevertheless contend that Rule 510.23(j) is intended to

prevent the "evil" of discrimination in charges between shippers which "could amount to an unreasonable preference or advantage in violation of Section 16 (First) of the Shipping Act of 1916" (Resp. Br., p. 10).

Respondents would carry water on both shoulders. They do not concede the necessity of a finding of unlawful conduct as the basis of the rule, yet they urge its support as an attempt "to eliminate unreasonable preferences" under the statute. Respondents may not have it both ways. If the rule is designed to prevent unlawful conduct under the "undue prejudice" part of Section 16 (First), then all of the long standing evidentiary tests for such a violation must be met (See Pet. No. 752, pp. 12-13). The court below has conceded that one essential element, proof of competitive relationship between shippers, has not been met (Pet. No. 752, p. 38). On the other hand, if a finding of illegality is unnecessary, we are at a loss to understand why respondents seek to justify the rule as an attempt to eliminate an unreasonable preference in violation of Section 16 (First).

Respondents further contend that the issue of illegality need not be reached because the Court of Appeals noted (Pet. No. 752, p. 38) that "the rule is fully justified as a prophylactic measure". (Resp. Br., p. 11, fn. 3). This is a startling basis for rule making. It would appear that any regulation, according to respondents, which has a prophylactic effect is lawful, regardless of whether it has a basis in law and is within the granted authority (*See Social Security Board* v. *Nierotko*, 327 U. S. 358). Petitioners are aware of no such revolutionary doctrine with respect to a regulatory agency's rule making power and respondents offer no supporting authority.

d. *Rule 510.25(a)*—Respondents deny that this rule will force a licensee to furnish information in violation of Section 20 of the Shipping Act on the ground that the rule defines "special contract" as limited to "financial arrange-

ments". The difficulty with this position is that the "special contract" is not so limited in practice. (See Pet. No. 752, p. 17). Of necessity, such contract contains information covered in Section 20 and if an outside party can examine such a contract, the licensee is compelled to violate the section.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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